BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit appears on pages 182 to 188 of the record inclusive and

Reported 131 Fed. (2nd) 362

Jurisdiction

1. The Judgment to be reviewed is dated November 10th, 1942 and appears on page 189 of the record.

2. The Statutory provision which is believed to sustain the jurisdiction of this Court is 28 U.S.C.A. sec. 347; 43 Stats 938.

3. We rely upon the statement of facts stated in the foregoing petition and the grounds therein set forth.

4. The opinion in the Court below has not been reported.

Statement of Case

We rely upon the statement embodied in the foregoing petition and, in addition, submit these additional remarks.

It is a fact generally known that only in the Fifth Circuit is there any sponge gathering, that it is all practically centered in Tarpon Springs, the home port of the boat in question and it appears from the record (p. 102 record),

that the men who do the gathering, including the boat captains who also work as divers, do so on a share or lay basis and obtain a cash advance before going out. Like many cases involving small sums of money, the principles herein presented are far-reaching and of vital importance to the workers in this industry and to those similarly situated. The evils which the Petitioners hope to remedy herein is the iniquitous system of advancing bounty to the men, with the consequent opportunity (as shown here) to profit by their necessities and the unjust enriching of the supply men by over-charges and usurious interest rates, however they may be concealed. The lower Court compared the seamen to the sharecroppers. However, the analogy is not complete because the party making advances to the share-cropper furnishes the land, whereas the boat owner and operator is on a parity with the members of the crew and is dependent upon the supply man to operate at all. This is well illustrated by the Captain's reply to the initial demand for bonus of $65.00 (p. 108 record). "What can you do? If it takes that to get it we will go ahead and do that." The record shows that the boat and the owners were in difficulties and it was a pressing emergency. The far-reaching effect of the lower Court's holding can readily be seen as a clear signal to the usurer to continue his nefarious trade. The record sets up the difficulty under which the boat operator labors in procuring a bond to relieve his boat (p. 19 record), and this presents a strange anomoly by which the admiralty lien, created to protect the comparatively weak ship-chandler from loss by reason of the migratory character of large and valuable

ocean going vessels, now becomes an instrument of oppression by the monied party, who, by a nominal cost stipulation can attach a small boat whose owner is hard put to relieve his property by a large bond based on the amount claimed. By reason of the poverty of the small boat owner, a threat of attachment in admiralty is usually sufficient to quell any evidence of discontent. It is the history of the sponge industry in Tarpon Springs during the past forty years that the boat operators and members of their crews, (the producers) who risk their lives to bring in the commodity, eke out a bare existence; while those furnishing the cash and supplies, live in safety and luxury and within a few years wax rich Unless it is possible to obtain some relief from such usurious practices in this cause, it is doubtful if any small boat owner will ever be able to present these or like questions.

Specification of Errors

The United States Court of Appeals for the Fifth Circuit erred:

1. In affirming the decision of the District Court.

2. In holding that the cash advanced in the home port to be used as advances to the Captain and members of the crew, and so used, before the voyage was commenced and before any wages or other compensation earned forms the basis for a maritime lien against the boat.

3. In refusing to apply the Usury Statute of the State of Florida to the cash advanced, there being no question that the amount charged and exacted for the use of the money was in excess of ten per cent and in excess of twenty-five per cent per annum.

4. In refusing to apply the Usury Statute of the State of Florida to cash advanced for the purchase of supplies and equipment from dealers who handled such commodities, permitting the lender to exact a rate of 15% for three months use of such funds.

5. In holding that the sponge diving boat Portaritisa was a fishing boat under the purview of the exception embodied in U.S.C.A. Tit. 46 Sec. 598; 34 Stat. 551; 46 U.S.C.A. Sec. 599; 41 Stat. 1006. Act June 5, 1920 Ch. 250 and approving as legal advance pay made to the crew of a sponge boat using diving equipment to gather sponges.

ARGUMENT

We follow the questions presented in the Petition in their order.

Point One

The holding of the United States Circuit Court of Appeals for the Fifth Circuit that the cash advanced in the home port before earned and used as advances to the Captain and to the crew is in conflict with decisions of the United States Circuit Court of Appeals for the Second

Circuit and is an important question of maritime law throughout the costal areas of the Nation and should be passed on by this Court.

At the time the cash was advanced to the Captain for his personal use and to the several members of the crew as appears in the account (p. 12 record), nothing had been earned by any of them and this the libelant testified he knew when he advanced the money. (pp. 92 and 102 record). The purpose of the advances and their application are explained on pages 113 and 123 of the record.

The Muskegon 275 Fed. 348

decided by the Circuit Court of Appeals for the Second Circuit June 1, 1921.

The evidence fails to show how much was advanced the Captain and how much to the crew and the Court allowed lien for all the advances, although the Captain has no maritime lien for any wages.

All cases cited in the opinion of the Circuit Court of Appeals for the Fifth Circuit (p. 187 record), are those where the cash was advanced in a foreign port or was advanced to pay off and discharge accounts which were in themselves liens.

38 C. J. Maritime Liens Sec. 66 and 67 (pp. 1228 and 1229)

Thomas v. Osborn 19 How. 22

The Grapeshot 9 Wall. 128

Davis v. Childs 7 Fed Case No. 3628 is a District Court case from Maine

Point Two

The lower Court holding as set forth in point one above is in conflict with the previous rulings of this Court on the subject.

This Court held in Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co. 254 U. S. 1 that Act June 23, 1910, 41 Stats. 1005 did not change the general principles of the law of maritime liens and reiterated the doctrine that such lien is a secret one and will not be extended by construction, analogy or inference. This, we submit, is what the lower Court sought to do by undertaking to base a lien on conditions yet to be brought about and that such holding is in direct conflict with the holding of this Court in Osaka Shosen Kiasha et al v. Pacific Export Lumber Co. 260 U. S. 490. See p. 187 of record. It cannot be said that a lien is derived from some event yet to take place, nor can one party be subrogated to another whose status is dependent upon future events.

See also cases cited under point one.

Point three

The lower Court's refusal to apply the State Usury Statute in an Admiralty proceeding is one never passed on by this Court and should be determined.

The boat being a local one and the money having been advanced and used in the home port would seem to make the Florida Statutes peculiarly applicable. There appear to be no decisions by the admiralty Courts in which this question ever came up. It being one of wide-reaching importance, we submit that it would be proper for this Court to take the case under consideration for this reason.

Point Four

The lower Court's refusal to apply the provisions of the State Usury Statutes to a condition shown by undisputed facts is an important question of local law and such decision is in conflict with applicable local decisions.

The Sections of the Florida Law relative to usury and which are applicable to this case are Compiled General Laws of Florida Sections 6937, 6938, and 6939 and 6942 and are all quoted in full in an appendix attached to this brief.

As far as this is applicable to the cash account, (p. 12 record), it is shown beyond dispute that for the use of $1074.05, advanced from time to time during August, September and October 1939—mostly in August and some slight advances in November, and to be returned December 11, 1939 the libelant received $65.00 bonus, $63.57, which he received as a payment and applied as interest (p. 12 record) (pp. 85, 86 & 99 of record) and also charged and was attempting to collect in this proceeding an additional ten per cent on the whole sum, which in itself is the

maximum which he could charge without subjecting himself to the penalties of usury and addition sought to recovery excessive amounts added to the charges in the supply account for last voyage.

The lower Court applied Section 6942 and forfeited principal and interest in a mortgage foreclosure carried there from the Southern District of Florida.

See Mortgage Securities Co. v. Levy, 11 Fed (2nd) 270, but in the present case refused to follow the holding of the Florida Supreme Court in

Homuth v. Dickson, 156 Sou. 127; 115 Fla. 790

In considering the question of usury with relation to the purchase of supplies where the libelant gave checks for their purchase, but never bought or handled or owned the articles, we may remark that the lower Court recognized such a situation as not constituting a sale and giving no lien in the case of Porobilo v. Taliancich 89 Fed. (2nd) 341, and that same was merely the loan of money for the purchase but refused to follow the holding of the Florida Supreme Court Hawley v. Kendall, 191 Sou. 10; 139 Fla. 850, where a similar situation existed regarding the purchase of real estate where title never was in the lender. In that case the usury did not amount to more than twenty-five per cent but was more than ten per cent and under Section 6939 double the amount paid was forfeited.

In Florida, the charging of usury, whether or not it

is paid by the borrower, such as a discount charge, is forfeited.

Hagan v. Neeb 140 Sou. 916; 105 Fla. 297
Sullivan v. Thumm 136 Sou. 439; 101 Fla. 1412.

The Florida Usury Statutes construed by the Florida Courts in the cases cited are attached to this brief as an appendix. C.G.L. 6937 fixes the rate of interest and defines usury. C.G.L. Sec. 6938 as will be seen is very broad and covers almost any situation. C.G.L. Sec. 6939 declares a forfeiture of double amount paid, when in excess of ten per cent and Sec. 6942 provides forfeiture of principal and interest when over twenty-five per cent per annum.

Point Five

The United States Circuit Court of Appeals for the Fifth Circuit held that sponge diving boat Portaritisa was a fishing boat under the provisions of U.S.C.A. Tit. 46 Sec. 599; 41 Stat. 1006 and we submit that this is an important question which has heretofore not been passed upon and should be settled by this Court.

Point Six

The sponge industry is confined exclusively to the Fifth Circuit, where all the gathering and selling of sponges is carried on and there is no likelihood of the classification of sponge boats with reference to the Statutory distinction mentioned or other question herein presented especially applicable to them being decided elsewhere.

We submit that this brings the question under the same principle as that applied by this Court recently in patent cases. It is a matter of common knowledge that sponges being exclusively a warm salt water product, there is no place beyond the confines of the Fifth Circuit where they can be gathered. We realize that the analogy between this and the patent cases is not perfect, but it is also true that the patented articles, while exclusively manufactured in one Circuit, are sold generally. This is also true with relation to sponges.

The cases to which we refer are:

Schriber-Schroth Co. v. Cleveland Trust Co.
305 U. S. 47

Exhibit Supply Co. v. Ace Patents Corporation,
315 U. S. 126

Muncie Gear Works, v. Outboard Marine &
Manufacturing Co., 315 U. S. 759

Point Seven

The Circuit Court of Appeals in the instant case permitted libelant to charge a premium or profit of 15% on money advanced by him to the Captain to pay cash for supplies bought by the Captain from others for cash, which was repayable in three months, or a rate of 60% per annum on such advances—thereby permitting this libelant to evade the usury laws of Florida and thereby refused to apply the local Florida Statute and decisions.

Point Eight

The Court below treated advances of money, as if they were "other necessaries" under U. S. Code Title 46, Sec. 971, Act June 5, 1920 Ch. 250 Sec. 30, sub sec. S; 41 Stats. 1005. Whereas, under Sec. 974, "advances" and the lien given for same were not to be changed by the statute. Existing Rules of law in effect did not permit a lien for advances at the home port, but such lien was dependent upon local law.

The Hatteras, 255 Fed. 518.
The Insonomia 285 Fed. 516.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals for the Fifth Circuit.

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Counsel for Petitioners.

APPENDIX

28 USCA,

§ 347. (*Judicial Code, section* 240, *amended.*) *Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia ; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed.* (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal. (Mar. 3, 1891, c. 517, § 6, 26 Stat. 828; Mar. 3, 1911, c. 231, § 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)

46 USCA,

§ 598 *Vessels engaged in taking oysters.* Sections 596, 599, and 604 shall apply to all vessels engaged in the taking of oysters. (June 28, 1906, c. 3583, § 4, 34 Stat. 551.)

Act Dec. 21, 1898, c. 28, § 26, 30 Stat. 764, provided that certain sections of that act should not apply to fishing or whaling vessels or yachts.

46 USCA,

§ 599. *Advances and allotments.* (a) It shall be un-

lawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages, or to make any order, or note, or other evidence of indebtedness therefor to any other person, or to pay any person, for the shipment of seaman when payment is deducted or to be deducted from a seaman's wages. Any person violating any of the foregoing provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than $25 nor more than $100, and may also be imprisoned for a period of not exceeding six months, at the discretion of the court. The payment of such advance wages or allotment, whether made within or without the United States or territory subject to the jurisdiction thereof, shall in no case except as herein provided absolve the vessel or the master or the owner thereof from the full payment of wages after the same shall have been actually earned, and shall be no defense to a libel suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment, as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be deemed guilty of a misdemeanor and shall be imprisoned not more than six months or fined not more than $500.

46 USCA,

§ 971. *Persons entitled to lien.* Any person furnishing repairs, supplies, towage, use of dry dock or marine

railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. (June 5, 1920, c. 250, § 30, subsec. P, 41 Stat. 1005.)

46 USCA,

§ 974. *Waiver of right to lien.* Nothing in this chapter shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien, or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by agreement or otherwise; and this chapter shall not be construed to affect the rules of law existing on June 5, 1920, in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessels, (3) the right to proceed in personam, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States. (June 5, 1920, c. 250, § 30, subsec. S, 41 Stat. 1005.)

USURY

Florida Statutory Provisions:

Compiled General Laws of Florida sec. 6937. Usurious Contracts Defined.—All contracts for the payment of interest upon loan, advance of money, or forbearance to enforce the collection of any debt, or upon any contract whatever at a higher rate of interest than ten per cent per annum, are hereby declared usurious.

Compiled General Laws of Florida 6938. Rate higher than ten per cent unlawful; proviso.—It shall be usury and unlawful for any person, association of persons, firm or corporation, or for any agent, officer or other representative of any person, association of persons, firm or corporation, to reserve, charge or take for any loan, or for any advance of money, or for forbearance to enforce the collection of any sum of money, a rate of interest greater than ten per cent per annum, either directly or indirectly, by way of commission for advances, discount, exchange, or by any contract contrivance or device whatever, whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received together with interest at the rate of ten per cent, as aforesaid. The provisions of this section shall not apply to sales of bonds in excess of one hundred dollars and mortgages securing the same, or money loaned on bonds.

Compiled General Laws of Florida 6939. Penalty for usury; not to apply to transferee or negotiable paper unless

usury appears on face.—Any person, association of persons, firm or corporation, or any agent, officer or other representative of any person, association of persons, firm or corporation, wilfully violating the provisions of section 6938 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this State, either at law or in equity; and when said usurious interest is taken or reserved, or has been paid, then and in that event the person, association of persons, firm or corporation who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted: Provided, however, that this shall not apply to a bona fide endorsee or transferee of negotiable paper purchased before maturity, unless the usurious character should appear upon its face, or that the said endorsee or transferee shall have had actual notice of the same before the purchase of such paper, but in such event double the amount of such usurious interest may be recovered after payment, by action against the party originally exacting the same, in any court of competent jurisdiction in this State, together with attorney's fee, as provided in section 6941.

Compiled General Laws of Florida 6942. Forfeiture and penalty in case of excessive interest or charges.—Any person, association or persons, firm or corporation or the agent, officer or other representative of any person, association of persons, firm or corporation lending money in this State who shall wilfully and knowingly charge or ac-

cept any sum of money greater than the sum of money loaned and an additional sum of money equal to twenty-five per cent per annum upon the principal sum loaned by any contract, contrivance or device whatever, directly or indirectly, by way of commissions, discount, exchange, interest, pretended sale of any article, assignment of salary or wages, inspection fees or other fees or otherwise, or for forbearing to enforce the collection of such monies or otherwise, shall forfeit the entire sum, both the principal and interest, to the party charged such usurious interest, and shall be deemed guilty of a misdemeanor, and on conviction, be fined not more than one hundred dollars or be imprisoned in the county jail not more than ninety days, or both, in the discretion of the court.